Grunau Company, Inc. *and* Tim Chaney. Case 9-CA-17963-1

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 September 1983 Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in answer to the General Counsel.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] In adopting the finding that the 4 February 1982 walkout in protest of Supervisor Peck's discharge was not protected by the Act, Chairman Dotson and Member Hunter find it unnecessary to reach the judge's discussion of *Puerto Rican Food Products Corp.*, 242 NLRB 899 (1979), enf. denied in relevant part 619 F.2d 153 (1st Cir. 1980), or whether said discharge was subject to arbitration. Member Zimmerman also finds it unnecessary to reach the question of whether the decision was subject to arbitration because he finds that under any view of the applicable law, Peck's supervisory position did not have a sufficiently direct impact on employees' working conditions to bring the employee protests within the protections of the Act.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge: This case was heard in Cincinnati, Ohio, on June 2 and 3, 1983, pursuant to charges[1] filed by Tim Chaney, an individual, and complaint issued September 8, 1982.[2] The complaint alleges that Grunau Company, Inc., herein the Respondent, violated Section 8(a)(1) of the National Labor Relations Act, herein the Act, by discharging Chaney and Gary Peck for protesting insubordinately the Respondent's earlier discharge of Richard Peck, who then had been both a supervisor for the Respondent and president of Local Union No. 113 of the United Association of Journeymen and Apprentices of the Plumbers and Pipe Fitting Industry of the United States and Canada, AFL-CIO, herein the Union. The Union is the duly recognized bargaining representative of certain of the Respondent's employees, including Chaney and Gary Peck, who is the son of Richard Peck. The Respondent, in its answer, denies the commission of unfair labor practices.[3]

[1] The original and amended charges were filed on February 5 and 8, 1982, respectively.

[2] All dates hereinafter are within 1982 unless otherwise specified.

Issues

Whether the Respondent violated Section 8(a)(1) of the Act by discharging Tim Chaney and Gary Peck, its employees, for instigating and/or participating in an employee walkout to protest the termination of Supervisor-Union President Richard Peck during the term of and contrary to collective-bargaining agreement containing a "no strike-no lock out" provision.

Subsidiary issues include whether the contractual grievance-arbitration procedure was applicable to Richard Peck's supervisory discharge and, if not, whether the no-strike clause constituted a waiver by the employees of the right to stop work to protest a supervisory termination that was not subject to challenge under the contract.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel and the Respondent, have been carefully considered.

On the entire record of this case[4] and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Wisconsin corporation with an office and place of business in Trenton, Ohio, has been engaged as a mechanical contractor in the building and construction industry, constructing industrial facilities in the State of Ohio.

During the calendar year ending December 31, 1981, a representative period, the Respondent, in the course and conduct of its operations purchased and received at its Trenton facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[3] Citing *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), enfd. sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983), the General Counsel does not contend that the discharge of Richard Peck was unlawful. In *Parker-Robb Chevrolet*, supra, the Board held that the "discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employer's interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is not unlawful for the . . . reason that employees, but not supervisors, have rights protected by the Act."

[4] By Order, dated February 24, 1983, the Board denied the Respondent's Motion for Summary Judgment, which had been opposed by the General Counsel, and directed that the matter be heard.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent, based in Milwaukee, Wisconsin, is one of the largest mechanical contracting concerns in this country. It operates only union jobs. Since 1980, the Respondent has been engaged in the construction of a brewery for the Miller Brewing Company in Trenton, Ohio. The overall cost of the new brewery is approximately $300 million, of which around $50 million has been allocated to the Respondent's work. The Respondent's onsite responsibilities for this project include installing all the mechanical systems, the heating, ventilating, and air conditioning, and all piping for the brewing process, including the water and the waste water treatment facilities. In February, when the events herein occurred, Mike Foley was the Respondent's project manager at the Trenton site and Ted Angelo was project superintendent and second in command to Foley.

In performing its contract, the Respondent employed approximately a peak level of 400 employees of whom about 300 were plumbers and pipefitters. Of these 300, around one-third were members of the Union, Local 113, and the remainder were travelers, members of its sister locals within the United Association.

The Respondent and the Union are subscribers to and are bound by the Project Agreement, a collective-bargaining agreement executed by and between Gilbane Building Company and the Butler County Building and Construction Trades Council and the signatory International Unions and/or Local Unions,[5] effective December 25, 1979, to continue in effect for the duration of the construction of the brewery project.

Article IV of the Project Agreement provides that there shall be no strikes, work stoppages, or lockouts during the contract term, while Article VI sets forth the grievance-arbitration procedure. These articles, in relevant part, are as follows:

> ARTICLE IV:
>
> WORK STOPPAGES AND LOCKOUTS
>
> 4.1 There shall be no strikes, picketing, slowdowns, refusals to work, walk-offs, sitdowns, mass absenteeism, sympathy strikes, honoring of picket lines (established by any Union, or by any other person or persons whether parties to this Agreement or otherwise) or other forms of work stoppage, or threats of any kind to engage in such conduct by the officers, members, or employees of any Union, or by employees represented by any Union at the Project site. The Union shall not permit, encourage, or condone any such conduct, and shall take all affirmative, positive steps through their international representatives to obtain compliance with this Article. Employees violating this provision are subject to discharge.
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> 4.2 The Union also agrees that if any Union or any other person or persons, whether parties to this Agreement or otherwise, engage in any picketing or work stoppage, the other Unions and employees shall consider such picketing or work stoppage to be illegal and shall refuse to honor any such picket line or work stoppage. Failure of any employee to cross any picket line is a violation of this Agreement.
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> 4.3 The Union agreed to be responsible for the conduct of the employees it represents and agrees to use its best efforts to remedy any actions in violation of this Article engaged in by any employees employed by the Employer or its subcontractors on the Project. The Union shall not be liable under this Article unless it has received telegraphic notification of such violation at its business office and has failed to attempt in good faith to remedy such violation within twenty-four (24) hours of receipt of such notification.
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> 4.4 There shall be no lockout or threats thereof by the Employer.
>
> 4.5 The Union shall have the right to withhold services from any Employer who becomes delinquent in the payment of proper wages, fringe benefit contributions, and deductions including lawfully authorized dues checkoffs. However, prior to striking, the Union will give ten (10) days written notice by registered or certified mail, return receipt requested, or five (5) working days notice by telegram to the involved Employer and the Owner. Representatives of the parties to the dispute will meet within the appropriate period to attempt to resolve the dispute. A return receipt following a mailing by registered or certified mail shall be conclusive proof of the date of receipt by a Union of Health and Welfare and Pension payments by a Subcontractor.
>
> 4.6 Nothing in this Agreement shall be construed to limit or restrict the right of the Union or the Employer to fully pursue any and all remedies available under law in the event of a violation of this Article. This Article is applicable pending the arbitration of grievances in accordance with Article VI.

Article VI, Grievance Procedure, section 6.1, provides, "There shall be no lock out, or strike, or cessation or slow down (of) work due to grievances arising during the life of this agreement." This provision made reference to article V of the Project Agreement which provides for the resolution of jurisdictional disputes without work stoppages of any kind, and also specific procedures for dealing with disputes or grievances involving the general contractor, a subcontractor, or matters of contract interpretation. Section 6.2 of the agreement sets forth a three-step grievance procedure, culminating, at

[5] Gilbane is the general contractor on the Miller Brewing Company, Trenton, Ohio project. The agreement also was signed by Plumbers & Pipefitters Local Union No. 108, which later merged with its sister Local Union No. 510 to form Local No. 113, the Union herein.

the fourth step, in binding arbitration. Step 4 provides that:

> The arbitrator shall have the authority to make decisions on issues presented to him concerning interpretation of the provisions of the Agreement. He shall have no authority to change, amend, add to, or detract from any of the provisions of this Agreement.

B. *The Facts*

1. The events of February 3

The Respondent, in recording employee attendance and time worked, requires that employees pick up numbered brass tags each day at a trailer shack located in an area of the brewery construction site parking lot near the main gate. These tags were picked up before the 7:30 a.m. starting time and returned there starting around 3:50 p.m., in advance of the formal 4 p.m. quitting time. The practice of returning the brass tags at the end of the day, a procedure analogous to "punching out" on a timeclock, is known as "dropping brass" or "brassing out."

Three steps on the north and south sides of the brass trailer, respectively, led up to a platform affording access to windows on each of those sides through which the tags are passed out and in at the start and end of each day. Employees were expected to pick up and drop their brass tags at either the north or side windows of the trailer, according to their respective tag numbers. While employees gradually picked up their tags as they arrived in the mornings, they returned the tags all at once in the evenings. This resulted in long lines at each window at the end of each day. It is undisputed that employees while waiting on these lines to return their tags were exposed to the prevailing weather conditions and that, when it rained or snowed, the ground in the area of the trailer could become very muddy.[6] While numerous oral complaints about these muddy conditions were made to union representatives and passed on to management, no written grievance had been filed in accordance with the grievance-arbitration procedure of the collective-bargaining agreement.

On February 3,[7] about 3:52 p.m., while approximately 150 employees were standing on the two lines leading to the north and south windows to return their tags, Richard Peck[8] ran to the head of the line on the north side of the building and mounted the steps. Peck testified that he told those standing in line that he was Richard Peck, the president of the Union, in case anyone did not know who he was, and that he was going to throw his brass into the mud because he was tired of being treated like an animal. The others could do as they wanted. Peck then threw his brass tag down into the mud. Many of the employees on the north and south lines followed Peck's example and also dropped their tags where they stood, although some deposited their tags on the trailer platform and steps to avoid the mud. Then, the employees left the premises.[9] Richard Peck conceded that he then went to the south side of the trailer to see how many of the employees there also had dropped their tags. He denied, however, that he had used stronger or other language to exhort the employees or that he had positioned himself on the steps to block employees who otherwise would have gone to the windows to turn in their tags. Peck also denied having deliberately kicked any of the tags into the mud from the platform and steps.[10]

Peck's account[11] is disputed by Company witnesses Ted Angelo, Dana Michael, and Robert Rohrbach, who were in the trailer at the time.[12] These witnesses testified that, when Richard Peck mounted the steps at the north side of the trailer, he told the men, "F—Grunau Company. It's time Local 113 showed them who was running this job, I am tired of being treated like an animal, having to stand in the mud and wade in the mud." He told the men to throw their "f brass" in the mud. Most of the men complied.

Michael testified that some of the employees on the other, the south, line came up to his window and handed him their brass tags. However, when Richard Peck saw what was happening, he went from the north to the south side and positioned himself in the center of the steps, again telling the men to throw their brass in the mud. This caused the others to walk around and away from Richard Peck. None tried to get by him, but some threw their brass toward Michael's south window. Rohrbach related that, when Richard Peck left the north side

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[6] The actual work areas were less exposed as they were roofed over and had concrete flooring.

[7] It is undisputed that February 3 was a cold day with some snowflakes and that the ground in the vicinity of the trailer was very muddy.

[8] On February 3, Peck was an area foreman in the power plant where he was responsible for 3 foremen and 24 employees. A member of U.A. for more than 30 years, he was a journeyman, plumber, and pipefitter and, also, was president of the Local Union, a fact known to the Respondent when he was hired. Peck originally had been engaged by the Respondent at the brewery jobsite in 1980 at a higher position, as a general foreman in waste water treatment, but had been demoted to journeyman 10 months later. Peck subsequently was advanced to area foreman, his position on February 3. As area foreman, Richard Peck was a supervisor within the meaning of Sec. 2(11) of the Act. In February, there were approximately 35 to 40 area foremen on the job who, in turn, reported to their respective general foremen. General foremen reported to the five area superintendents who were responsible to the project superintendent, Ted Angelo. Angelo was immediately under Mike Foley, the project manager.

[9] In addition to the plumbers and pipefitters who dropped their brass tags into the mud and left at Peck's urging, his example also was followed by other tradesmen on the lines at the time, including carpenters, ironworkers, and sheetmetal workers.

[10] Chaney testified that, at the end of the average day, it took no more than 3 minutes from the time he got on line until he brassed out.

[11] Richard Peck's testimony is corroborated by his son, Gary, and by Tim Chaney.

[12] Angelo, as project superintendent and the Respondent's second in command, on this job, happened to be in the trailer at the time of Peck's protest because he had wanted to verify whether the men were lining up too early to "drop brass." The trailer was manned regularly in the mornings and evenings by Michael, at the south window, and Rohrbach, at the north. Michael, who handled the brassing and timekeeping, worked in the trailer throughout the day making labels for the plant and attending to paperwork, while Rohrbach, the safety security manager, was in the trailer only when the tags were given out and collected. When distributing and taking in the tags, Michael and Rohrbach would make appropriate entries on the "brass sheets" to show who was on the job and on absence lists to show who was not. These records were delivered to the Respondent's office by Rohrbach. After the tags were thrown into the mud, Michael and Rohrbach attempted to recover as many as possible and prepared replacement tags, as needed.

of the trailer, his son, Gary, took over for him there, accompanied by Tim Chaney. Gary Peck went up the north steps while Chaney stood at "the end of the steps," blocking access to the trailer. As had his father, Gary Peck raked off those tags that had been left on the platform and steps into the mud on the north side while Richard Peck continued to do the same thing on the south side.[13]

When Richard Peck began his protest, Project Superintendent Angelo immediately telephoned the union hall from the trailer and told business agent Charles Mignery[14] what was happening at the time; that Richard Peck was causing problems and was shouting that Local 113 was running this job. At one point, Angelo held the phone out the window, asking if Mignery heard what was happening. The conversation continued during the rest of the demonstration and the call was joined, according to Angelo, by Business Manager Rodney A. Combs. As the protest continued, Angelo informed the union representatives on the telephone just when the brass was thrown into the mud. The conversation ended when Angelo reported that Peck had left.

The basic facts concerning Richard Peck's activities on February 3 in causing employees to throw their brass tags in the mud are stipulated, and the differences between Richard Peck's account and those of the Respondent's witnesses lie principally in the vehemence with which he acted. As the lawfulness of Peck's discharge on the following day for this conduct is not an issue in this proceeding, the factual circumstances are relevant merely as background for the events that followed. Therefore, credibility resolutions are not necessary concerning the events of February 3, with respect to the activities of Richard Peck, or even of Gary Peck and Tim Chaney that day as the Respondent has predicated their subsequent terminations on what they did during the following day when Richard Peck's discharge became known, and not on actions attributed to them on February 3.

Accordingly, having found that Richard Peck had incited the brass-dropping and early walkout incident of February 3, there is no need to resolve conflicting accounts relating to the vigor with which he acted. As noted, no prior formal grievance had been filed by the Union, or by Peck in his official capacity, concerning the brass-dropping procedure or the adverse conditions to which the employees were exposed while waiting to "brass out."[15]

[13] Gary Peck and Chaney denied any such participation on February 3. While both conceded that they had joined the others in throwing down their own brass, as suggested by Richard Peck, they otherwise merely were observers.

[14] Mignery, as business agent, and Rodney A. Combs, the business manager and chief officer, were the Union's two full-time paid officials.

[15] It is worth noting, however, that although the General Counsel emphasized in his brief that Michael, from the south side of the trailer, might not have heard all that Richard Peck had said while on the trailer's north steps, a similar consideration worked against the accuracy of Richard Peck's account. Peck testified, in effect, that he did all of his inciting on the north side of the trailer and, later, went to the south side merely to observe how many of the employees on line there also had thrown down their brass tags. While the occupants of the trailer, with open windows at either end and close proximity to the action, were better situated, collectively and individually, to know what was going on immediately outside, it is less clear, considering the greater distance and possible obstruction by the trailer, how the employees on the south line would know to throw down their tags unless separately urged. Therefore, it appears more likely, as described by the Respondent's witnesses, that Richard Peck was being unduly modest in describing his activities at the south side of the trailer.

2. The events of February 4

Gary Peck and Tim Chaney testified that they arrived at work on Thursday, February 4, before their 7:30 a.m. starting time, picked up their respective brass tags from the trailer and went to their work station in the D.E. fab area,[16] where they worked as journeymen pipefitters. In addition to working together, the two men were friends. Each had had previous periods of employment with the Respondent on the brewery project,[17] and both were members of the Union.

At their work area, their general foreman, Bob Richmond, unlocked their gang (tool) boxes for them as he did every morning, and they began work. Chaney and Gary Peck soon asked someone passing through if Richard Peck had been terminated. They then asked Richmond for permission to go to the powerhouse to learn if anything had happened to Richard Peck. According to Chaney, Richmond told them to go, but to come back as soon as possible.[18]

The two men then went to the power plant, approximately 100 to 150 yards away, where they saw Richard Peck with Area Superintendents Charlie Williams and Emery Pegram,[19] and Peck's general foreman, Wayne Ashford.

In response to their inquiry, Richard Peck told Gary Peck and Chaney that it looked as though he had been fired and was waiting for a steward. Gary Peck then shouted at Ashford words to the effect that Ashford probably could have prevented his father's discharge. Ashford did not reply. Richard Peck cautioned Gary Peck and Chaney to return to their work area as the Company was looking for an excuse to fire somebody. Chaney and Peck went back to the D.E. fab shop after an absence of 5 to 10 minutes.

When they returned there, they told two other employees who intermittently work in their area, Thomas Baxter and Ron Chaney,[20] of Richard Peck's discharge. The four men decided to discuss Peck's termination with Barney Dragger, the Union's vice president, who worked in the machine room, approximately 50 yards from where they were. They did not seek their foreman's permission before leaving.

[16] D.E. is for diatomaceous earth, used to coat beer filters in the brewery. Materials and piping for the brewery are fabricated in the D.E. fab shop.

[17] Gary Peck was first hired by the Respondent on July 30, 1980, when the project started; resigned on August 4, 1980; was rehired August 10, 1981; and resigned on August 19, 1981. Peck was rehired on October 14, 1981, and remained with the Respondent until terminated on February 5. Chaney initially was employed by the Respondent from June 22 to July 8, 1981, when he resigned. He worked again for the Respondent from September 1 to 29, 1981; resigned; was rehired on November 9, 1981; and stayed until his February 5 termination.

[18] Gary Peck could not recall whether Richmond had responded to their request.

[19] Richard Peck had worked under Pegram's general supervision as Pegram's responsibilities included water treatment in the powerhouse.

[20] Tim Chaney and Ron Chaney are not related.

Baxter and Ron Chaney proceeded to Dragger's work station, but Tim Chaney and Gary Peck, before going to see Dragger, first stopped at the powerhouse where they found steward Ronnie Chastin with Richard Peck. Chaney asked Chastin what he was going to do about Richard Peck's discharge. Chastin replied that there was nothing that could be done. He had called the union representatives who directed that Richard Peck go to the union hall. Gary Peck and Chaney insisted that Chastin call the union representatives again to tell them to come out to the job. Chastin replied that he was taking Richard Peck to the union hall, and told Richard Peck to accompany him.

Gary Peck and Chaney then joined Baxter, Ron Chaney and Union Vice President Dragger in the machine room. It was not yet 9 a.m. Baxter, who had brought a copy of the U.A. constitution, showed Dragger Section 102, relating to the Local president, where it was provided in relevant part that, "The president . . . shall have a general supervisory control over all matters pertaining to the welfare of the Local Union." As interpreted by Baxter, this section meant that, as president, Richard Peck was responsible for the welfare of the membership. Baxter declared that because conditions were unacceptable to Richard Peck, the president, the men should go along with him. Dragger told the others to wait for the union representatives to come to the job.

The four men discussed Peck's termination further with Dragger for about 10 minutes. Baxter reiterated that Peck's discharge had been unjust as the punishment was more than the situation demanded. Dragger repeated that the men should let the union representatives handle the matter. Tim Chaney responded, "Fine, but where are they?" Dragger again advised them to go to their work stations and to leave the matter to the union representatives.

At that time, Edward R. Bowden, the D.E. fab shop foreman, approached and told the four men that he had been told to tell them to return to their work area.[21] Gary Peck, Tim Chaney, and Baxter testified that Bowden also told them that there would be a general meeting in the cold service area at 9:30 a.m., and that the men were going to be sick.[22]

Gary Peck related that, as they were returning to their work station, he asked Bowden for permission to see his brother, Gregory Peck, at the package warehouse, to see if he had learned anything about what was happening. Bowden told Peck to return as soon as possible.

Gary Peck returned to his work area 15 minutes later, his brother not having heard anything. Although he began to work, he continued to discuss his father's discharge with employees who came to the shop. An employee, Bill Buckley, asked Tim Chaney and Gary Peck if they knew there was going to be a meeting at 9:30 a.m. concerning the firing of the Local Union's president.

At or about 9:30, Bowden returned and told them that the meeting was beginning in the cold service area.

Tim Chaney and Gary Peck then went to the cold service area together, followed by Bowden. Chaney and Peck testified that when they arrived approximately 200 employees were already there. There was much noise, shouting, and screaming, with men saying they were getting out of there; expressing outrage that the president of the Local Union had been fired over such a trivial affair. According to Peck and Chaney, when they arrived the meeting was starting to break up and the men were leaving the job, talking about brassing out and going home sick. Chaney and Gary Peck also headed for the gate and brassed out[23] and went home.[24]

The walkout occurred at approximately 9:30 a.m. At around 10:10 a.m. that day, Project Manager Foley sent the following mailgram to Martin J. Ward, general president, United Association of Plumbers and Pipefitters:

> You are hereby notified: Local 113 is in violation of Article 4 of Project Agreement, Work Stoppages, page 6 specifically, "walk offs." You have 24 hours to supply manpower to this job (Miller Brewing Company Trenton Ohio) or we will take whatever means to man this job.

The record contains no response from Ward.

The walkout, joined by approximately 200 employees, lasted one day. When Tim Chaney and Gary Peck reported for work the next day, with the others, as will be detailed below, they, alone of the participating employees, were terminated for having instigated a work stoppage in violation of the above-described no-strike provision of the collective-bargaining agreement.

The Respondent challenges the testimony by Chaney and Gary Peck that they had arrived when the meeting was ending, had played a passive role, and had quietly left with the others as but two participants in a walkout by many.

Frank B. (Brad) Jones[25] testified that, during the morning of February 4, he had seen Tim Chaney and Gary Peck away from their work area, talking to three or four others in the machine room. He next saw them talking to several people in the powerhouse.

Jones testified that he again saw Peck and Chaney that morning, after 9 a.m., at the meeting in the cold service area. Peck was standing on a toolbox telling everybody to get off the job; they were tired of being pushed around. Chaney was standing next to him. Jones saw Dale Smith's efforts to get the employees to return to work was drowned out by Peck, Chaney, and others. Jones estimated that approximately 100 employees were

[21] Bowden related that he had asked the men to return to their work area as directed by his general and area foremen, who had seen some of his men in the machine room.

[22] Bowden recalled that he mentioned the meeting to the men later that morning, but did not testify that he had told them that the men would be sick.

[23] It is undisputed that the employees who left work early on February 4 brassed out in the customary manner, returning their tags at the trailer.

[24] Dale Smith, one of the employees at the cold service area meeting, had stood on a gang box, announced that he had been appointed temporary steward that morning, and urged the men to return to work. Smith was shouted down or ignored.

[25] Jones was the Respondent's area superintendent over the brew house and cold service.

at the cold service area meeting. He agreed that there had been much shouting.

Jones' description of the meeting which led to the walkout essentially was corroborated by August R. Chiaverotti, area superintendent over fermenting, aging, the D.E. storage area, and fab shop, under whose general jurisdiction Gary Peck and Tim Chaney worked.

Chiaverotti testified that when, on the morning of February 4, he entered the cold service area approximately 50 employees were gathered. He saw Gary Peck standing on a toolbox with Chaney by him on the floor. Peck was urging the employees to walk off, telling them, in effect, that the Company was no longer going to shame, or embarrass, his father.[26] Within the next 3 to 4 minutes, about 100 more people entered the area and gathered in a semicircle around Peck and Chaney. The meeting became very loud and Chiaverotti decided to leave.

3. The events of February 5

Gary Peck and Tim Chaney reported to work the next morning, Friday, February 5, at their usual time, Peck arriving slightly before Chaney.

Peck related that the timekeeper at the brass trailer could not find his brass tag, but that Area Superintendent Jones had appeared and handed him a termination slip and his paycheck. Jones told Peck that he had been discharged. Peck did not ask why.

After receiving his check, Gary Peck saw union business representative Mignery outside the brass trailer and asked if he should accept the check. Mignery told him to take the check and hold on as Business Manager Combs and Chastin, the steward, were meeting with company officials in the office. He advised Peck to wait and see what happens.

In the meantime, Chaney also reported back to work. He observed Mignery standing by the brass trailer, directing the arriving men to pick up their brass and return to work. As Chaney neared the trailer, Gary Peck told him that they had been fired. Chaney, noting the envelope in Peck's hand, expressed doubt that they were supposed to take their check from anyone but their foreman. Peck, however, reassured him that Mignery had said that it was all right to take the check.

When Chaney asked for his brass tag at the trailer, Jones handed him his check in an envelope and told him that he had been terminated. Chaney returned to Mignery and Gary Peck and asked what was going to happen. Mignery informed him, too, that Combs and Chastin were in the Respondent's office trailer talking to Project Manager Foley.[27]

When Combs and Chastin emerged from their meeting with Foley, they reported that nothing had yet been accomplished. However, Combs asserted that he was going to try to get their jobs back. Combs and Chastin took the paychecks from Peck and Chaney and went back for another meeting with management.

About 20 to 30 minutes later, Combs and Chastin again appeared, returned the paychecks to the two men, and announced that there was nothing more they could do. Combs related that they nearly had been successful, but that when Foley learned that the men had accepted their checks, the Company would not budge. Combs suggested that Peck and Foley go to the National Labor Relations Board, which they did.[28]

Project Superintendent Angelo recounted that the decision to discharge Gary Peck and Tim Chaney as instigators of what the Company considered was an unprotected walkout in violation to the Project Agreement was made on the afternoon of February 4 following discussion with Area Superintendent Chiaverotti. Chiaverotti had reported having seen Peck and Chaney talking to the men. The union representatives were notified that day of the decision to terminate the two men and were requested to be present the next morning when Peck and Chaney were to receive their checks to help avoid any incident.

On Monday, February 8, Angelo met with union representatives William R. Crellin, International representative of the U.A., Combs, Mignery, and Chastin. The work stoppage of February 4 was discussed. Crellin, as spokesman for the union group, agreed that Gary Peck and Tim Chaney had been fired for just cause. As far as the Union was concerned, it had made an agreement that there would be no work stoppages. If Peck and Chaney had participated in a work stoppage they were guilty and the Union did not protect individuals who caused work stoppages. Crellin assured the Respondent that the Union would do everything in its power to see that such an incident never reoccurred.

No grievances were filed concerning the discharges of Richard Peck, Gary Peck, or Tim Chaney.

4. Credibility resolutions

Gary Peck and Tim Chaney, as noted, testified that they had taken passive roles at the employees' meeting in the cold service area on the morning of February 4, arriving as the meeting was ending, and that they merely had been among the many who then had left work to protest Richard Peck's discharge. They denied having incited the men to stop work and to walk out as charged by Area Superintendents Chiaverotti and Jones, who, also, had seen but not heard them talking to other employees earlier that morning at various places away from their work station.

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[26] Although Area Superintendent Jones testified, as noted, that he had heard Gary Peck telling everybody to get off the job during the cold service area meeting, he did not relate that he also had heard Peck tell the employees that the Company no longer was going to shame or embarrass his father.

[27] Combs testified that he had been called by the Respondent at the union hall on February 4 as the men were leaving the job, and, with Mignery, arrived at the jobsite that morning at or around 10:30, when, in meeting with Foley and Angelo, he first learned that Richard Peck had been terminated. Late that afternoon he was advised by company officials that Tim Chaney and Gary Peck also were going to be discharged the next morning, and was asked to be there on that occasion. Accordingly, when Peck and Chaney were notified of their discharges, Combs already was discussing their status with Foley.

[28] Combs, called as a witness by the Respondent, testified that he had had only one meeting with management on February 5 concerning the discharges of Gary Peck and Chaney. He did not testify that he had taken the men's final checks and returned for a second meeting, as described by Peck and Chaney.

I do not credit the assertions of Peck and Chaney that their role at the meeting was passive and that they did not, at least, contribute to the walkout by urging the others to leave work. From the time they arrived at work some 2 hours before the meeting, by their own admissions, Peck and Chaney had done little but pursue the discharge of Richard Peck, while spending virtually no time at their assigned tasks. With or without permission, Peck and Chaney repeatedly left their work area, twice visiting Richard Peck at the powerhouse where, on one trip, Gary shouted at his father's supervisor. With Baxter and Ron Chaney, they conferred with Union Vice President Dragger in the machine area. Gary Peck then went on to speak to his brother, Gregory, in the package warehouse. Even when Peck and Chaney finally returned to their area, as directed by supervision, they continued to discuss Richard Peck's discharge with other employees in the area. It would be totally inconsistent with this continuous involvement in Richard Peck's termination and with Gary Peck's obvious concern for his father to conclude that Peck and Chaney would have been among the last to arrive at an employee meeting called to protest Richard Peck's discharge, or that they merely would have been passive onlookers at such meeting.[29]

Although the General Counsel adduced testimony that it was customary for Peck and Chaney, as D.E. fab shop employees, to leave their work area in the course of their duties to deliver or pick up piping elsewhere on the project, their continued and unrelated absences from their work station on the morning of February 4, while they engaged in repeated discussions with other employees and where Gary Peck even yelled at his father's supervisor, went well beyond the business-related trips from their work area described as permissible.

Also, contrary to the General Counsel, the Respondent's supervisory witnesses' credibility as to what occurred at the cold service area meeting was not lessened by their understandable reluctance to confront and seek to control a large group of angry employees.

I, therefore, credit the Respondent's witnesses that Gary Peck and Tim Chaney had played an active role in urging the employees to walk out during the cold service area meeting on February 4.

[29] Although the testimony of Peck and Chaney in this regard is generally supported by Bowden, their foreman at the time, the record tends strongly to indicate that Bowden identified throughout with these men, rather than with management, a perception which may have colored his testimony. On February 3, Bowden had been among those who had thrown their brass tags into the mud at Richard Peck's urging. When, on the next day, he was directed by higher supervision to send Chaney and Peck back to their work areas, he did not simply direct them to return, but, apologetically told them that it had been told to him to tell them to go back where they belong. He also participated in the February 4 walkout. Finally, by the time of the hearing, Bowden, first, had been reduced from foreman to journeyman welder, and, later, was laid off while on sick leave from a work-related injury. While Bowden may have been presented by the General Counsel as the dischargees' supervisor at the time in question, his sympathies and interests, as evidenced by his activities and status, lay clearly with Peck and Chaney rather than with the Respondent, and his testimony must be evaluated in that light.

C. *Discussion and Conclusions*

The General Counsel contends that the February 4 walkout, which led to the discharge of Gary Peck and Tim Chaney, was protected by the Act, as were their jobs, as it was a concerted action in opposition to the disciplining of Union President/Supervisor Richard Peck, who had been fired for leading an employee protest to secure improved working conditions. The General Counsel further argues that, since under their interpretation of the collective-bargaining agreement, Richard Peck's loss of employment was not arbitrable, the contractual no-strike provision did not constitute a waiver of the employees' right to strike in protest of the supervisory discharge.

The Respondent's fundamental contention is that Gary Peck and Tim Chaney were terminated for having instigated an unprotected work stoppage in violation of the no-strike provision of the collective-bargaining agreement. In effect, the Respondent's position is that there had been two consecutive unprotected employee walkouts, and that Gary Peck and Tim Chaney were lawfully fired for inciting the second such walkout to protest the discipline afforded to Richard Peck for having led the first.

The general rule was restated in *Puerto Rico Food Products Corp.*:[30]

> Whether concerted actions by employees to protest an employer's selection or termination of a supervisor fall within the purview of Section 7 of the Act depends on the facts of each case. In this regard the Board has consistently held that where facts establish that the identity and capability of the supervisor involved has a direct impact on the employees' own job interests they are legitimately concerned with his identity and thereby have a protected right to protest his termination.[4]

[4] *Dobbs Houses, Inc.*, 135 NLRB 885, 888 (1962), enforcement denied 325 F.2d 531 (5th Cir. 1963); see also *Kelso Marine, Inc.*, 199 NLRB 7 (1972); *Plastilite Corporation*, 153 NLRB 180 (1965), modified on other grounds 375 F.2d 343 (8th Cir. 1967); *Clever-Brooks Manufacturing Corporation*, 120 NLRB 1135 (1958), enforcement denied 264 F.2d 637 (7th Cir. 1959); *Ace Handle Corporation*, 100 NLRB 1279 (1952).

In *Puerto Rican Food Products Corp.*, supra, the Board found that five unrepresented employees had been discharged in violation of Section 8(a)(1) of the Act for having refused to work in protest of the discharge of a supervisor whose continued employment would have been beneficial to their job interests. The Board held that, under those facts, the supervisor there involved had had a sufficiently direct impact on the employees' job interests so that they were protected in refusing to work in protest of his discharge.[31]

The present situation, however, where the employees are represented by a union, more closely resembles

[30] 242 NLRB 899, 900 (1979), enf. denied in relevant part 619 F.2d 153 (1st Cir. 1980).

[31] See, contra, *Keyway*, 263 NLRB 1168 (1982).

Singer Co.,[32] on which the Respondent largely relies. That case, in finding that an employee work stoppage protesting that the Respondent's failure to promote a favored supervisor was unprotected, distinguishes *Puerto Rican Food Products*. Administrative Law Judge Taplitz, in his Board-approved decision in *The Singer Company, supra*, provided the following analysis at 993–994:

> There is, however, a critical factual distinction between the situations in the *Puerto Rico Food Products* line of cases and the instant case. In the *Puerto Rico Food Products* line of cases, employees who did not have any collective bargaining representative took direct action relating to the retention or dismissal of a company supervisor. There were no collective-bargaining concepts to be considered. In the instant case the RAs [Resident Advisors, the protesting employees] had selected a collective-bargaining representative and the Board had certified that representative. Respondent and the Union had a mutual obligation to bargain with each other. In such circumstances both the employer and the union have the right to select their own representatives free from interference by the other side. If either a company or a union could control the selection of representatives by the other side there could be no meaningful collective bargaining. Instead of a dialogue the party who controlled the selection of the representative for the other side would merely be talking to itself. Section 8(b)(1)(B) of the Act provides that it is an unfair labor practice for a labor organization or its agents to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. See *Laborers' International Union of North America, AFL-CIO (International Builders of Florida, Inc.)*, 204 NLRB 357, enfd. 505 F.2d 192 (D.C. Cir. 1974); *American Broadcasting Companies Inc. Writers Guild of America, West, Inc., et al. v. [N.L.R.B.]*, 437 U.S. 411 (1978). A serious argument could be made that if the Union had called the demonstration and work stoppage in an attempt to control the selection of the supervisor of residential living, the Union would have violated Section 8(b)(1)(B) of the Act. This section applies only to labor organizations and their agents and does not apply to employees who are acting other than as agents for the union. The employees side-stepped their Union in this case and acted on their own. It appears that they did not even inform the Union what they were going to do. However, in such circumstances I do not believe that employees have a protected right to circumvent their own collective-bargaining representative and take action that would have been against public policy had the collective-bargaining representative engaged in it.[16]
>
> In sum, I find that while the RAs actions were not unlawful, neither were they affirmatively protected by the Act. In these circumstances I find that the RAs' actions with regard to influencing the choice by Respondent of its supervisor were not protected by the Act. [Fns. 14 and 15 omitted. Bracketed material supplied.]

The present situation is even stronger than in the *Singer Co.*, where the union had been the protesting employees' bargaining representative for only slightly more than 2 weeks before the occurrence of the contested events, and had not executed a collective-bargaining agreement with the Employer. Here, a collective-bargaining agreement containing a no-strike clause was in place and the relevant restraints were more clearly defined.

From the above finding in *Singer*, I conclude that the work stoppage of February 4 was not protected. Unlike *Puerto Rican Food Products Corp.* and related cases, the employees here were represented and had an obligation, not fulfilled, to bargain concerning matters in dispute. The employees' conduct in stopping work and walking out to influence the Respondent in its choice of supervisor, while not violative of Section 8(b)(1)(B), as individually undertaken and not sponsored or sanctioned by a union, nonetheless was the type of conduct proscribed by that section of the Act and is unprotected as against public policy.

Even if the General Counsel's position that Richard Peck's discharge was not arbitrable were valid, the above public policy consideration would sufficiently rebut the General Counsel's argument that, in these circumstances, the February 4 walkout was protected activity.

However, the General Counsel's assumption that Richard Peck's termination could not have been arbitrated under the Project Agreement is unsubstantiated. In his decision in *Jesco, Inc.*,[33] as approved by the Board, Administrative Law Judge Corenman found that a wildcat walkout by approximately 20 employees to protest the discharge of three foremen who were members of their union[34] was unprotected as it occurred without union authorization and contrary to the instructions of the Union's business agent, and, also, because it was in viola-

[32] 256 NLRB 989 fn. 2 (1981). Also see *Permaglass Division*, 210 NLRB 184, 186–187 (1974).

[16] In *Abilities and Goodwill, Inc.*, [241 NLRB 27, enf. denied 612 F.2d 6 (1st Cir. 1979)], there was no collective-bargaining agent and the 8(b)(1)(B) issue was not raised in the Board case. However, the First Circuit in denying enforcement stated that "the specific language of the Act recognizes the employer's interest in remaining free of employee interference in managerial decisions regarding the selection of personnel for handling employee grievances."

[33] 214 NLRB 790, 795 (1974).

[34] In *Jesco, Inc.*, as here, one of the three discharged foremen was also president of the Local Union. Although it was not specifically found in *Jesco* that the three disciplined foremen were supervisors within the meaning of Sec. 2(11) of the Act, such a conclusion is consistent with the tenor of the decision and the customary practices of the industry.

tion of the existing contractual no-strike clause. The parties' agreement contained a "comprehensive" grievance and arbitration procedure.

In *Jesco, Inc.*, supra at 795, the Board found that the dispute concerning the discharge of the three foremen could and should have been disposed of under the grievance and arbitration procedure as their terminations had not been for any of the reasons specified in the collective-bargaining agreement as exempt from the operation of the grievance-arbitration procedure.[35] It, therefore, was concluded that the walkout protesting the foremen's discharge violated the contractual no-strike agreement and that the employees who had walked off the job in participation were unprotected.

Analogously, in the present matter section 4.5 of the Project Agreement, quoted more fully above, gives the Union, after appropriate notice and settlement efforts, the right to withhold services from any employer "who becomes delinquent in the payment of proper wages, fringe benefit contributions, and deductions including lawfully authorized dues checkoff." The Union's right to withhold services in such circumstances existed even in the face of the comprehensive no-strike language of articles IV and VI of the Project Agreement. Disputes then in the foregoing areas, therefore, similarly were exempted from the grievance-arbitration clause of the project agreement.

Here, as in *Jesco, Inc.*, the February 4 walkout was undertaken to protest a supervisory discharge which had not occurred for any of the reasons exempted by section 4.5 of the contract from the grievance and arbitration procedure. Also here, as in *Jesco, Inc.*, where both the relevant contract provisions and circumstances were similar, Richard Peck's supervisory status did not automatically bar his discharge from the grievance-arbitration procedure. As he was not let go for any of the contractually-specified reasons which would have removed his termination from the grievance-arbitration procedure under the contractual exemptions, his discharge, too, could have been considered under that process. For this reason, too, I find that the walkout in protest of his discharge was unprotected, and that the employees who took part, including Gary Peck and Tim Chaney, were engaged in an unprotected concerted activity.[36]

In the present matter, Richard Peck, on February 3, led a walkout of employees who had not yet brassed out to protest the muddy, exposed conditions at the brass trailer.[37] Although he long had complained informally about these conditions and had relayed similar complaints from others before acting on February 3, he had not filed a formal grievance under the project agreement in his official capacity as president of the Union, nor had any other grievance been filed concerning the adverse conditions at the trailer. In these circumstances, as conditions at the trailer clearly were grievable, it is difficult to conclude in light of the contractual no-strike clause, that Richard Peck's conduct on February 3 would have been protected had he been a nonsupervisory Local Union president at the time.

The unprotected nature of Richard Peck's conduct is relevant because it tends to more dramatically illustrate that the General Counsel's position, if accepted, would create an exception to the contractual no-strike clause which would enable employees who were aggrieved by a supervisory disharge, even if for unprotected activity, to withhold their services in protest. As the employees, concededly, could not have engaged in the same work stoppage in the face of the no-strike clause and grievance-arbitration procedure to protect the job of a similarly circumstanced nonsupervisory union officer, the permissible disruptive potential by employees on behalf of a disciplined supervisor would become greater than on behalf of an identically situated nonsupervisory employee.

The effect would be to reduce the efficacy and, therefore, the appeal of no-strike clauses in contracts. In *Mastro Plastics Corp. v. NLRB*,[38] the U.S. Supreme Court noted that, in appropriate circumstances, waivers of the employees' right to strike and of the employers' right to lockout to enforce their respective economic demands during the term of such contracts "contribute to the normal flow of commerce and to the maintenance of regular production schedules." As such it generally is recognized that the inclusion of "no-strike, no lockout" provisions provides an incentive of periodic labor peace and workplace stability for entering into collective-bargaining agreements. It would not be consistent with this public policy favoring such clauses to seek, under the

[35] Exempted from the grievance-arbitration procedure in *Jesco, Inc.*, were disputes concerning the payment of wages, travel or subsistence, fringe benefits, or contributions to any trust fund.

[36] The General Counsel's position that Richard Peck's supervisory discharge was not arbitrable is, as noted, an assumption based on an interpretation of the contract provision and stipulation that the appointment and termination of union foremen were management prerogatives, and the Union's stipulation that no grievances concerning supervisory discharge had been previously filed under the project agreement. Such an arrangement is hardly novel. Even apart from contractually reserved management rights, the law is structured to preserve for management the basic right to appoint and discharge its supervisors and all employees. "The right to hire and fire and to control tenure of employment is an employer's alone." *Miranda Fuel Co.*, 140 NLRB 181, 188 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). Should these functions be delegated to a labor organization, under the Board's *Miranda Fuel* decision, the Employer would remain responsible for the unlawful manner in which the Union exercised the delegation. Also, as mentioned in the discussion concerning *Singer Co.*, supra, it is violative of Sec. 8(b)(1)(B) of the Act for the Union to cause a work stoppage to influence an employer in its choice of supervisor. The point is that against this background of law and of contract language affirming management's control over supervision and employment in general, the Board, in *Jesco, Inc.*, supra, held in circumstances similar to those involved here, that as the three foremen's discharge could and should have been arbitrated, the employee walkout to protest same was not protected activity. This recognizes the distinction that while management, in the first instance, controls various aspects of the job, from the hiring, discharge, and tenure of supervisors to the assignment of work, absent specific contractual exemption, the manner in which these prerogatives are exercised may be challenged under the grievance-arbitration procedure, and, where applicable, as in situations arising under *Parker-Robb Chevrolet*, supra, before the Board. As unions have a right to evaluate the merits of potential grievances and as the aggrieved not always are diligent, the bare stipulated fact that no supervisory discharge grievances had been filed under the Project Agreement, without further showing, is too inconclusive to be meaningful.

[37] The Respondent's argument in its brief that Richard Peck's protest on February 3 was unrelated to working conditions is completely unsupported by the record.

[38] 350 U.S. 270, 280 (1956).

circumstances of this case, to create a precedent tending to erode their utility and acceptance.

Having found for the above reasons that the February 4, 1982, walkout was unprotected by the Act as violative of the no-strike clause contained in the Project Agreement, I further conclude that the employees who participated in it, including Gary Peck and Tim Chaney, were engaged in an unprotected concerted activity and that, contrary to the complaint allegations, the Respondent did not violate Section 8(a)(1) of the Act by discharging these two men.

Although to develop a more certain factual account, I resolved conflicting testimony by crediting evidence that Gary Peck and Tim Chaney had actively encouraged employees to participate in the February 4 walkout, that credibility resolution did not significantly augment the result reached here as the participation by Peck and Chaney in the walkout is undisputed. Therefore, their conduct was unprotected. As restated in *Jesco, Inc.*,[39] "When a strike is unprotected, an employer may discipline some but not all of the employees involved provided, however, that the selection for discipline is not based on the employee's union membership or other union activity."

It is undisputed that in the present matter, the Respondent, a major mechanical contractor, operates only union jobs, signing nationwide and local collective-bargaining agreements, as applicable. In the present matter, all its employees were hired through the Union's hiring hall and it accepted advice from union officials familiar with the local work force as to who would be qualified to be supervisors.[40] There is no evidence that the Respondent has interfered with the union activities of its employees or that the selection of Gary Peck and Tim Chaney for termination was based on a desire to discriminate against any membership faction of Local Union No. 113.

For these reasons the complaint should be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel had not established by a preponderance of the credible evidence that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[41]

The complaint is dismissed in its entirety.

[39] Supra 214 NLRB at 790.

[40] Richard Peck initially was hired as a supervisor on the Union's recommendation.

[41] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.